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July 17, 2003

Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Michigan*, WC Docket No. 03-138

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), and at the request of FCC staff, I am attaching a copy of the brief that SBC filed on May 20, 2003, with the Michigan PSC in response to the complaint of TDS Metrocom, LLC ("TDS") regarding the waiver of termination charges. See Attachment A. In addition, I am attaching a copy of the June 16, 2003, order of the Michigan PSC denying TDS's request for emergency relief. See Attachment B.

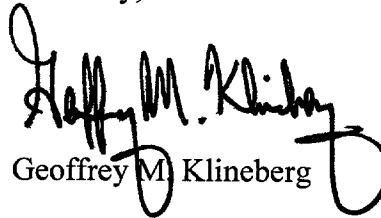
I am also writing to inform you that representatives of SBC met yesterday (both in person and by telephone) with FCC staff to discuss various issues, including operation support systems, line splitting, E911, and the TDS complaint. The following participated on behalf of SBC: Martin E. Grambow, Kelly M. Murray, Travis M. Dodd, Randall Johnson, Craig A. Anderson, Robin M. Gleason, Beth Lawson, Rick Caldwell, Carol Chapman, Kristin Cogswell, Tim Oyer, Louise Hutto, Thomas P. Hinkelman, Rebecca L. Sparks, Andrew Montalvo, Jamie Williams, and Geoffrey M. Klineberg. The following participated on behalf of the FCC: Jeremy Miller, Gina Spade, Russ Hanser, Marcus Maher, Jennifer McKee, Ben Childers, John Hays, and Pam Arluk.

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Ex Parte Presentation

In accordance with this Commission's Public Notice, DA 03-2039 (June 19, 2003), SBC is filing this letter electronically through the Commission's Electronic Comment Filing System. Thank you for your kind assistance in this matter.

Sincerely,



Geoffrey M. Klineberg

Attachments

cc: Gina Spade
Susan Pié
Rodney Gregg
Layla Seirafi-Najar
Qualex International

Attachment A



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May 20, 2003

Via Hand Delivery

Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911

**Re: In the matter of TDS METROCOM, LLC's formal complaint,
application, and request for emergency relief against SBC Michigan
Case No. U-13789**

Dear Ms. Wideman:

Please find enclosed for filing the original and 15 copies of *SBC Michigan's Response In Opposition To The Request For Emergency Relief* and *Proof of Service*.

If you should have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "William J. Champion III".

William J. Champion III

WJC/mds
Enclosure

cc: Administrative Law Judge (w/encl.)
Michael S. Ashton, Esq (w/encl.)

C o u n s e l l o r s A t L a w

DETROIT BLOOMFIELD HILLS LANSING GRAND RAPIDS ANN ARBOR
WASHINGTON, D.C.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of TDS METROCOM, LLC's)	
formal complaint, application, and)	
request for emergency relief against)	Case No. U-13789
SBC Ameritech Michigan)	
_____)	

SBC MICHIGAN'S RESPONSE
IN OPPOSITION TO THE REQUEST FOR EMERGENCY RELIEF

SBC Michigan submits the following response in opposition to the request for emergency relief ("ERO Request"), filed on May 13, 2003 by TDS Metrocom, LLC ("TDS").¹

For the reasons set forth below, the request for emergency relief should be denied.

I. THE REQUIREMENTS FOR GRANTING EMERGENCY RELIEF PURSUANT TO SECTION 203(2) OF THE MTA, AS AMENDED

A complaining party may request that the Commission issue an emergency relief order ("ERO") requiring the respondent to "act or refrain from action to protect competition". MCL 484.2203(2); MSA 22.1469(203)(2). An ERO may only be issued if the Commission concludes that all of the following requirements have been met:

(a) that the party has demonstrated exigent circumstances that warrant emergency relief;

(b) that the party seeking relief will likely succeed on the merits;

¹ SBC reserves the right to answer or otherwise respond to the complaint at an appropriate time and, if necessary, to submit testimony and exhibits at a time determined by the Commission.

(c) that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted; and

(d) that the order is not adverse to the public interest.

MCL 484.2203(3); MSA 22.1469(203)(3). The burden of proving these elements is on the party seeking the ERO. MCL 484.2203(8); MSA 22.1469(203)(8). As demonstrated below, TDS has failed to establish all of the above elements and their ERO request must be denied.

II. OVERVIEW OF THE CASE

Stripped of its conclusory allegations and unsupportable legal claims, TDS's complaint boils down to the following:

- TDS and SBC Michigan entered into a private contract pursuant to which the parties mutually agreed to waive applicable early termination charges in certain contracts with their respective end user customers for local and toll service when those customers switch their service from one company to the other ("Mutual Waiver Agreement.")
- TDS claims that SBC has breached the Mutual Waiver Agreement by:
 1. "refus[ing] to advise either TDS Metrocom or the customers in advance of the switch as to whether SBC will honor its agreement to waive the customers' early termination fees;"² and

² TDS Metrocom LLC's Motion and Brief in Support of its Request for Emergency Relief ("TDS ERO Motion"), at 8.

2. billing contractual termination fees to 20 out of 169 customers who switched their service to TDS.³

TDS seeks a variety of statutory penalties, none of which are applicable, and an emergency relief order requiring "SBC to waive the early termination fees or penalties of customers for the customers set forth on Confidential Exhibits C-__ and __ (TM-1 and 2) and other similarly situated customers seeking to switch their service from SBC to TDS Metrocom." [TDS ERO Motion, at 16] Its complaint and ERO request are supported by proposed testimony that, in large part, consists of hearsay and improper legal argument.⁴

As described in more detail below, TDS is not entitled to an ERO.

A. Background of Term Agreements

In order to put TDS's complaint in context, a brief discussion of the background of term agreements in Michigan is appropriate.

³ TDS ERO Motion, at 8. According to the proposed direct testimony of Todd McNally, SBC has promised to credit the early termination fees billed to 3 of those customers, and partially credit the account of a fourth customer. [McNally Direct, at 4] This contradicts the proposed direct testimony of Peter J. Healy. Mr. Healy claims that "SBC has promised to credit the early termination fees and penalties imposed upon only 1 of these 20 customers." [Healy Direct, at 8] TDS seems confused as to the number of total number of contracts involved as well. The Complaint alleges that TDS has "located 228 customers who have or are willing to switch from SBC to TDS." [Complaint, at ¶24] Mr. Loch claims that "TDS Metrocom has secured contracts from 136 customers." [Loch Direct, at 7] Mr. McNally claims that "TDS Metrocom has 169 customers who have switched from SBC to TDS Metrocom." [McNally Direct, at 4]

⁴ Much of the "testimony" would clearly be subject to a motion to strike. For example, Mr. Healy's prefiled testimony relates that "TDS Metrocom's marketing persons contacted me and stated that TDS Metrocom was being discriminated against." [Healy Direct, at 4] Similarly, Mr. Loch's prefiled testimony relates conversations with TDS's field sales and marketing staff and conveys Mr. Loch's view as to SBC's intentions. [Loch Direct Testimony, at 4].

TDS and SBC Michigan both provide local exchange service and toll service to end users in Michigan. Both companies have entered into term contracts with certain (typically business) customers under which the customers receive discounts from standard rates in exchange for volume or term commitments. Where customers obtain the benefits of these agreements and then breach the agreements by disconnecting their service before the end of the contractual term, the contracts impose early termination fees.

In its June 6, 2002 Opinion and Order in *CLECA v Ameritech Michigan*, Case No. U-13193, the Commission described SBC's term contracts as follows:

A common aspect of the term contracts at issue in the complaint (ValueLink, CompleteLink, SimpleLink, Centrex, FeatureLink, and their variations) is that they package together both regulated and unregulated services and require the customer to subscribe to the package for a specified term in order to receive a specified discount. The discount in turn may apply to the charges for both regulated and unregulated services.⁵

In the *CLECA* case, the Commission rejected the complainants' claims that SBC Michigan's use of term contracts containing early termination fees was unlawful. The Commission further found that it lacked jurisdiction to adjudicate disputes arising out of these contracts.

Subject to some exceptions that the complainants do not raise, see, e.g., MCL 484.2502, MCL 484.2505, MCL 484.2507, the MTA does not authorize the Commission to exercise jurisdiction over unregulated services or to modify their pricing. MCL 484.2401. Thus, any violation relating to regulated services would require the Commission, in effect, to separate out the unregulated and regulated provisions of the contract before it could fashion a remedy. Because the contracts combine both types of services into one discounted package, this could prove to be difficult. The Commission cannot adjudicate proposed remedies relating to the pricing or legality of unregulated services, and disputes concerning any of those services belong in some other forum. . . . As set forth in the November 5, 1998 order in Case No. U-11525, the Commission did not find the ValueLink contracts to be inherently anticompetitive when offered to business customers. In general, business customers are deemed capable of negotiating contracts with term discounts. If Ameritech Michigan later seeks to renegotiate an extended term

⁵ Id., at 11

with a customer, the customer is even more likely to be aware of competitive alternatives.⁶

Notwithstanding the Commission's determination that SBC Michigan's 's term contracts were lawful, on January 15, 2003, SBC Michigan issued an "Accessible Letter" notifying CLECs that SBC Michigan was willing to enter into agreements with CLECs under which SBC Michigan and CLECs would *mutually* agree to waive early termination charges imposed under certain term contracts in the event a customer wished to switch service from SBC to the CLEC or vice versa.

On January 29, 2003, SBC entered into a mutual waiver of termination charges with TDS. The key provisions of the agreement are discussed below.

B. The Scope of the Mutual Waiver Agreement

Contrary to the argument contained in the TDS ERO Motion, the Mutual Waiver Agreement is not applicable to every contract for each and every telecommunication service.⁷ To the contrary, the agreement carefully delimits the term contracts that are subject to the mutual waiver. First, in order to be an eligible contract within the definition of the agreement, a contract must be with an end user customer. Thus, contracts with providers and others who are not buying the service for their own end use are not within the scope of the agreement.

⁶ Id., at 11 – 12. In its November 5, 1998 Order in Case No. U-11525, the Commission upheld SBC Michigan's term contracts, including early termination provisions, stating, "As Ameritech Michigan points out, other providers have similar programs in which customers are given a discount for agreeing to a specific minimum use for a particular minimum period of time. To prohibit Ameritech Michigan from the ability to offer such plans would unduly impair the company's ability to compete with other providers.

⁷ See, e.g., TDS's ERO Brief, at 7.

Moreover, in order to be subject to the Mutual Waiver Agreement, a term contract must include toll service and/or local exchange service. The Mutual Waiver Agreement expressly defines the term contracts to which it is applicable:

WHEREAS SBC and CLEC [TDS] have entered into term contracts with certain end user subscribers for telecommunications services in the State of Michigan *which include intraLATA and/or interLATA toll service, local exchange service, and/or associated features*, under which such subscribers may receive discounts based upon the volume of services used or agreed to be used, length of term and other factors (“Term Contracts”). . . . (Emphasis added.)

Furthermore, even when the Mutual Waiver Agreement is applicable, and the parties have agreed to waive certain charges that would normally be imposed upon a subscriber that breached the agreement, the parties did not agree to waive *all* charges that may be owed by a subscriber under a term agreement. Instead, the charges the parties agreed to waive include:

charges imposed for termination of a Term Contract before its stated expiration date, but . . . *not charges incurred for services provided prior to termination, including, but not limited to, under-utilization charges pro-rated to the date of termination* (Emphasis added.)

For example, to the extent a term contract requires a customer to make certain minimum purchases of local or toll service during the period preceding contract termination, the customer is not relieved of that obligation by breaching the agreement to obtain service from a provider with which SBC Michigan has entered into a Mutual Waiver Agreement.

III. TDS HAS NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS ON COUNT I

A. The Commission Does Not Have Jurisdiction Over The Agreement Between TDS and SBC Michigan.

As the Commission recognized in *CLECA, supra*, the Commission does not have jurisdiction to adjudicate disputes regarding unregulated services. Here, the alleged dispute between TDS and SBC Michigan is even further removed from the Commission's regulatory authority. TDS's complaint does not, and could not, challenge SBC Michigan's term contracts. At best, TDS's complaint attempts to set forth a tenuous claim for breach of an unregulated contract between the parties to mutually waive certain rights those parties have under their largely unregulated contracts with their respective end users. In short, this is not a dispute arising out of the provision of regulated telecommunication services.

As the Commission stated in its December 6, 2002 Opinion and Order in *Ameritech Michigan v. Ace Telephone, et. al*, Case No. U-13501,

The disputed contract was negotiated privately between the parties, with no Commission participation or approval needed. That some aspects of . . . service might be regulated is not dispositive of this question because the issue raised in the complaint (the proper interpretation of the terms of the contract) is not subject to regulation. Thus, the dispute does not relate to a regulated telecommunication issue.

As in *Ace, supra*, both the Mutual Waiver Agreement and the Climax agreement were "negotiated privately between the parties." As in *Ace*, "there was no Commission participation or approval needed." As in *Ace*, the issue raised in the complaint is "the proper interpretation of the terms of the contract." As in *Ace*, that dispute "does not relate to a telecommunication issue."

As further discussed below, the conclusory, bootstrapped, allegations that SBC Michigan has violated the MTA and federal Telecommunications Act arising out of TDS's tortured reading of the parties' unregulated agreement do not stand up to even cursory scrutiny.

B. The Climax Red Herring

Counts IV, V, VI, VII, VIII, IX and X of TDS' complaint concern an agreement between SBC Michigan and Climax Telephone Company ("the Climax Agreement.") TDS claims that, prior to entering into the Mutual Waiver Agreement, SBC Michigan entered into an agreement with Climax Telephone Company under which SBC Michigan agreed to waive contractual early termination fees. [Complaint, ¶3] TDS claims the Climax Agreement violates Sections 352 (Count IV), 355 (Count V), 304 (Count VI), and 502(1)(f) (Count VII) of the Michigan Telecommunications Act and Sections 251(c)(2)(D) (Count VIII), 251 (c)(3) (Count IX), and Section 252 (Count X) of the federal Telecommunications Act.

Not only are TDS's claims baseless, they have absolutely no relevance to its request for emergency relief. TDS does not seek an ERO to prevent SBC Michigan from honoring the Climax Agreement.⁸ Indeed, it does not seek any emergency relief with respect to that agreement. Instead, the sole relief TDS seeks is to impose its unreasonable interpretation of the Mutual Waiver Agreement – an interpretation that flies in the face of the express language of the agreement – on SBC Michigan. Accordingly, its claims with respect to the Climax Agreement

⁸ Of course, since Climax is not a party to this proceeding, it is doubtful that the Commission could, consistent with due process, impair Climax's rights in this proceeding.

have no bearing on its ERO request. Nonetheless, SBC Michigan will briefly discuss those claims, and illustrate their lack of merit.

1. Background of the Climax Agreement

In order to better understand this case, a brief discussion of the background of the Climax Agreement may be helpful to the Commission.

Climax Telephone Company (“Climax”) is an independent telephone company (“ICO”), providing local exchange service as an ILEC in its Climax exchange. Climax subsequently became a CLEC, offering competitive local exchange service to customers in SBC’s incumbent local exchanges in the areas surrounding Climax’s original ILEC exchange.

Prior to Climax becoming a CLEC, Climax offered only local service to its end users in its original exchange, and toll service to Climax’s local service customers was provided by SBC Michigan under what was referred to at the time as the PEC/SEC (Primary Exchange Carrier/ Secondary Exchange Carrier) or Primary Toll Carrier (PTC) arrangement. Under these longstanding relationships, SBC Michigan provided intraLATA toll service to Climax end users, while Climax billed its subscribers for the intraLATA toll service on SBC Michigan’s behalf.

IntraLATA toll traffic from Climax end users was routed to SBC Michigan from Climax over existing Feature Group C trunking arrangements. SBC Michigan handled the traffic, paid originating access charges to Climax, and, if applicable, terminating access charges to the local service provider where the call terminated.

When Climax became a CLEC, offering competing local service in SBC Michigan’s surrounding exchanges, Climax was unique among most CLECs in that it offered to its customers local service only, and was not a toll provider. In its initial arbitration of an interconnection agreement with SBC Michigan, Climax sought and ultimately won from the

Commission the right to continue to require SBC to be the toll provider to Climax's new competitive local customers under the same PEC/SEC arrangements used for Climax's customers in its incumbent exchange.

Eventually, Climax upgraded its switch to provide "2-PIC" capability, so that Climax end users could choose an alternative intraLATA toll provider other than SBC. Nonetheless, under the Climax/SBC interconnection agreement, SBC was required to continue to provide intraLATA toll to all Climax end users.

Subsequently, an issue arose in Michigan regarding SBC's end user customers who had entered into term contracts with SBC for toll service. Some CLECs raised a concern that when such a customer wanted to switch its local service to a CLEC, SBC Michigan would deem the toll contract terminated and would seek to assess termination liability. SBC Michigan ultimately agreed that when a customer who had a term contract with SBC Michigan for intraLATA toll service wanted to switch local service to a CLEC, SBC Michigan would not automatically deem the toll contract to be terminated. In its November 5, 1998 Opinion and Order in Case No. U-11525, the Commission determined that SBC would be required to provide this stand-alone toll arrangement or it would be precluded from assessing contract termination fees if it could not do so.

In order to provide this "stand alone toll" service, SBC Michigan was required to put in place new arrangements for both trunking and billing. While SBC Michigan was able to find a way to provision this stand alone toll arrangement to most CLECs, it could not do so with Climax, because Climax was entitled under its interconnection agreement with SBC Michigan to get toll for Climax end users under the old PEC/SEC arrangements, where the Climax end users were billed for their SBC-provisioned toll by Climax, and the traffic was routed over the existing

Feature Group C trunking arrangements. To put this arrangement in place for Climax, the old PEC/SEC arrangement mandated by the interconnection agreement between Climax and SBC would have had to been abandoned.

For this reason, when specific situations arose involving Climax where an SBC Michigan end user with a SBC Michigan toll contract wanted to switch local service to Climax, SBC was unable to continue to provision stand alone toll, and therefore was forced to waive termination liability on a case-by-case basis.

When the *CLECA* case, *supra*, was filed, Climax sought to intervene. While not opposing SBC Michigan's term contracts, Climax expressed concern about the process by which SBC Michigan and Climax were addressing termination liability on a case-by-case basis. As a result of those discussions, SBC Michigan's retail business unit entered into a confidential settlement agreement with Climax whereby Climax agreed to not address its unique concerns related to termination liability in the case, and SBC Michigan and Climax entered into an agreement to mutually waive termination liability in certain situations.

When TDS contacted SBC Michigan and raised concerns that the Climax Agreement could impact TDS's ability to compete with Climax, SBC Michigan offered to TDS (and all other CLECs) to enter into agreements under the same terms as offered to Climax to mutually waive termination liability. SBC Michigan has subsequently entered into Mutual Waiver Agreements with at least nine other CLECs as well.

**2. The Climax Agreement Does Not Violate MTA
Section 352 as Alleged in Count IV**

In Count IV of its Complaint, TDS claims that the Climax Agreement violated Section 352 of the MTA. Section 352 provides,

- (1) Until January 1, 1997, the rates of a provider of basic local exchange service for interconnection under this article shall be at the provider's total service long run incremental cost of providing the service. After January 1, 1997, the rate for interconnection shall be just and reasonable as determined by the commission.
- (2) The rates for unbundled loops, number portability, and the termination of local traffic shall be the rates established under commission case U-10647 and shall remain in effect until new total service long run incremental cost studies for such services have been approved by the commission.

As discussed in more detail below, the Climax agreement has nothing to do with interconnection, let alone interconnection rates.

**3. The Climax Agreement Does Not Violate MTA
Section 355 as Alleged in Count V**

In Count V of its Complaint, TDS alleges that the Climax Agreement violates MTA Section 355. Section 355 provides,

- 1) On or before January 1, 1996, a provider of basic local exchange service shall unbundle and separately price each basic local exchange service offered by the provider into the loop and port components and allow other providers to purchase such services on a nondiscriminatory basis.
- 2) Unbundled services and points of interconnection shall include at a minimum the loop and the switch port.

As discussed below, nothing in the Climax Agreement (or the Mutual Waiver Agreement) has even the most remote connection to the duty of local exchange providers to offer loop and port components on a nondiscriminatory basis, or affects in any way how loops or ports

are provided, if at all. Rather, the agreements relate to the waiver of rights each party has with respect to *retail* customers. Indeed, nothing in the agreements even requires the parties to purchase loops or ports from the other party.

4. The Climax Agreement Does Not Violate MTA Section 304 as Alleged in Count VI

Count VI alleges that the Climax Agreement violates MTA Section 304's requirement that "the rates for basic local exchange service shall be just and reasonable." Basic local exchange service consists of the "the provision of an access line and usage within a local calling area." MCL 484.1202(b). An agreement between two providers to mutually waive valid contractual termination fees otherwise payable by one of their subscribers has nothing to with the provision of basic local exchange service. TDS's claim that waiving termination fees for some customers (those desiring to switch to a provider with which SBC had entered into a Mutual Waiver Agreement), but not for others "resulted in SBC charging unreasonably discriminatory basic local exchange rates" is totally without merit. In any event, TDS is not a customer of SBC's basic local exchange service, and lacks standing to even assert such a specious claim.⁹

⁹ Of course, by agreeing to a term contract, SBC Michigan's end-user customers have received the benefit of reduced rates. Part of the *quid pro quo* for the reduced rates is the customer's agreement to continue to purchase service over the life of the agreement. Where the Mutual Waiver Agreement applies, customers are relieved of that future obligation.

5. The Climax Agreement Does Not Violate Sections 251 or 252 of the Federal Telecommunications Act as alleged in Counts VIII, IX and X.

In Counts VIII, IX and X of its Complaint, TDS alleges that the Climax Agreement violated Sections 251 and 252 of the federal Telecommunications Act of 1996. The claims are totally devoid of merit.

Under Section 251(b), both SBC and TDS have a duty "to interconnect directly or indirectly with the facilities of other telecommunication carriers." As an incumbent local exchange carrier, SBC has the further obligation under Section 251((c)(2)(D) to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."

The thrust of TDS's allegation is that the Climax Agreement was a "secret deal" that should have been filed and approved by the MPSC as an "interconnection agreement," and that the failure to do so constitutes a violation of Section 252 of the federal Telecommunications Act of 1996. Complaint, Count X.

But nowhere in TDS's complaint, emergency motion, or supporting testimony does TDS present any factual or legal analysis to support this claim, or cite to any authority or precedent to support it's bare allegation that the federal Act was violated. TDS does not even try to explain why this is an "interconnection agreement", how it is related in any way to any of SBC's obligations under the federal Act, or tell the Commission what standards should be applied to determine whether this is an "interconnection agreement" that must be filed and approved.

Not every agreement between two carriers is an "interconnection agreement" under Section 251. SBC Michigan and TDS have a separate, Commission-approved interconnection agreement that complies with Sections 251 and 252 (as do SBC Michigan and Climax.) Neither the Climax Agreement nor the Mutual Waiver Agreement in any way concerns the interconnection of the parties' facilities. Indeed, nothing in these agreements has anything to do with interconnection or even require the parties to have an interconnection agreement.

Even a cursory examination of the subject matter of the contract and the standards applicable to determine what is an "interconnection agreement" shows that TDS is clearly wrong. The Climax Agreement, just like the Mutual Waiver Agreement, is not an "interconnection agreement."

In its Memorandum Opinion and Order (MO&O) adopted on October 2, 2002 in WC Docket 02-09¹⁰, the FCC clarified what types agreements between local exchange carriers constitute "interconnection agreements" – and what types do not.

[W]e find that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).

In contrast to an agreement affecting these enumerated interconnection issues, the FCC determined that other agreements between local exchange carriers are not "interconnection agreements" subject to filing and approval requirements.

We therefore disagree with the parties that advocate the filing of all agreements between an incumbent LEC and a requesting carrier. . . . Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."

¹⁰ *In the Matter of Qwest Communications International Inc. Petition for a Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under 252(a)(1).*

In particular, the FCC made clear that "[S]ettlement contracts that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed."¹¹

Neither the Climax Agreement nor the Mutual Waiver Agreement has anything to do whatsoever with *any* of SBC Michigan's obligations to a CLEC under 251 or 252. These are agreements between the retail business unit of SBC Michigan and the retail business units of CLECs that have entered into retail term contracts with end users.

In fact, it doesn't matter whether or not a CLEC is buying any resold services, unbundled network elements or anything else from SBC Michigan, whether they are interconnected with SBC Michigan, or providing services to end users solely using its own facilities. Neither the Mutual Waiver Agreement nor the Climax Agreement purports to amend any existing interconnection agreements. In fact, having an interconnection agreement with SBC Michigan is not even required to enter into the Mutual Waiver Agreement.

In short, the agreements in question are simply voluntary agreements between two retail providers to waive their retail contract rights in certain situations.

Ironically, if TDS's untenable position that the Climax Agreement is an "interconnection agreement" were adopted, the logical corollary is that the Mutual Waiver Agreement is also an "interconnection agreement" that must be filed and approved by the Commission in order to be enforceable. Of course, TDS claims no such thing. Instead, as discussed below, it seeks to enforce this "unfiled", "unapproved" agreement. TDS attempts to explain away this fatal flaw in its case by distinguishing the "public" nature of the Mutual Waiver Agreement with the "secret" Climax Agreement. The law makes no such distinction. All interconnection agreements must be

¹¹ *Id.*, at 6-7.

filed and approved by the Commission, whether or not their existence is made known to all CLECs.

SBC Michigan and Climax had every right to enter into a private settlement agreement that resolved the unique issues unique between the parties. Neither SBC Michigan nor Climax had any obligation to file, seek approval or give public notice to anyone regarding their agreement. Nevertheless, when TDS first raised its concerns with SBC Michigan about the impact that the Climax Agreement might have on TDS, SBC Michigan voluntarily made the same arrangement available not only to TDS, but to all CLECs, via the most readily available means to immediately communicate to all CLECs, an accessible letter.

Accordingly, Counts VIII, IX and X of the Complaint do not form any basis for issuing an ERO.

6. SBC Michigan is Not Discriminating Against TDS

In its ERO Motion, TDS claims that SBC Michigan is discriminating against TDS. The motion fails to identify any specific statutory or other duty SBC Michigan is allegedly violating by this alleged “discrimination.”¹² Nor does TDS apparently seek any emergency relief with respect to the “discrimination.” Rather TDS seeks an ERO to enforce the Mutual Waiver Agreement – in a manner consistent with TDS’s erroneous reading of that agreement.

¹² Apparently, the “discrimination” claims arise out of the allegation that SBC Michigan entered into the Climax Agreement before TDS requested or entered into the Mutual Waiver Agreement. TDS does not claim that SBC Michigan is somehow treating Climax more favorably today. *See*, prefiled Direct Testimony of Matthew Loch, at 6; prefiled Direct Testimony of Peter Healy, at 6 –7.

TDS’s “discrimination” claims boil down to an allegation that it was unaware that SBC Michigan had entered into the Climax Agreement, and that had it known about the agreement, it would have requested a similar agreement earlier.¹³ Even assuming, *arguendo*, that TDS could establish that SBC Michigan had some sort of duty to advise TDS of the Climax Agreement (which it didn’t), and that SBC had some sort of duty to offer a similar agreement to TDS (which it didn’t), TDS does not point to any *ongoing* injury, let alone an irreparable injury, flowing from its failure to enter into the Mutual Waiver Agreement at some earlier point in time.

C. SBC MICHIGAN HAS NOT BREACHED THE MUTUAL WAIVER AGREEMENT

Counts I, II, III, of TDS’s complaint allege that SBC Michigan has violated the Mutual Waiver Agreement, and that this alleged breach of contract violates various provisions of the MTA. Counts XI and XII merely allege that the Commission has jurisdiction to interpret the Mutual Waiver Agreement and that the manner in which SBC Michigan is interpreting the agreement “effects [sic] the quality, general availability and conditions for regulated services.” [Complaint, Paragraph 67.]¹⁴ None of TDS’s claims pass muster.

¹³ According to the prefiled direct testimony of Matthew J. Loch, “Through careful research we discovered that SBC had entered into an agreement with Climax, a Michigan CLEC.” [Matthew Loch Direct Testimony, at 4] Apparently, this careful research consisted of being in the right place at the right time as “Joe Vernon, Director of Sales for Climax, boasted of the advantage Climax had in competitive bid situations.” [Mark Neistat Direct Testimony, at 3]

¹⁴ TDS can’t have it both ways. TDS would apparently have the Commission interpret the plain language of the agreement in a way that would impermissibly broaden its scope. Were the Commission to find, however, that SBC’s interpretation of the agreement is consistent with its plain language, TDS would apparently have the Commission remake the parties’ agreement in a manner more to TDS’s liking.

First, TDS has wholly failed to establish that SBC Michigan has violated the Mutual Waiver Agreement. Second, even assuming SBC has violated the Mutual Waiver Agreement, TDS has failed to establish an MTA violation, let alone a violation that would entitle it to emergency relief.

TDS claims that SBC Michigan breached the Mutual Waiver Agreement by failing to waive early termination fees that, presumably, should have been waived under the agreement, and by refusing “to advise in advance of the switch from SBC to TDS Metrocom as to whether it will honor its agreement to waive the customers’ early termination fees. [Complaint, at Paragraph 25] The proposed testimony of TDS in this regard is inconsistent, self-contradictory, and totally fails to support its claims that SBC Michigan has failed to honor its agreement. In addition, TDS has not, and cannot, point to any language in the Mutual Termination Agreement supporting its rather extraordinary claim that SBC Michigan is somehow obligated to, in effect, undertake an additional obligation to give TDS advice as to whether SBC Michigan views the agreement to be applicable to a given fact situation. The Mutual Waiver Agreement speaks for itself, and TDS and its attorneys should be at least as capable as SBC of interpreting the language of the Mutual Waiver Agreement and determining what are contracts with end users for local or toll service. Nothing in the agreement obligates either party to undertake such a burden. Instead, the agreement requires both parties to provide advance notice of a switch in order to arrange for appropriate billing changes.

In his prefiled direct testimony, Todd McNally states that “TDS Metrocom has 169 customers who have switched from SBC to TDS Metrocom based on the fact that the early termination fees and/or penalties in their contracts would be waived by SBC.” {Todd McNally Direct Testimony, at 4} In his prefiled direct testimony, Matthew Loch alleges that “TDS

MetroCom has secured contracts from 136 customers who have relied upon the provisions of SBC's Accessible Letter.” [Todd McNally Direct Testimony, at 7] Finally, Peter Healy's prefiled direct testimony claims refers to 228 customers who either have switched to TDS or apparently plan to. [Peter Healy Direct Testimony, at 8]

Healy claims that SBC Michigan sent bills for early termination fees and penalties to 20 customers, but subsequently credited 1 customer and gave another a partial credit. [Peter Healy Direct Testimony, at 8] Loch and McNally claim that SBC credited 3 customers and gave a partial credit to a fourth. [Todd McNally Direct Testimony, at 4; Matthew Loch Direct Testimony, at 7] All three witnesses seem to agree that SBC has only refused to credit early termination fees for two customers. [Todd McNally Direct Testimony, at 4; Peter Healy Direct Testimony, at 8; Matthew Loch Direct Testimony, at 7]

While McNally has presented a spreadsheet [Proposed Confidential Exhibit C-___] purporting to identify those customers SBC Michigan billed for something, there is not a shred of evidence that any of the bills SBC sent to these customers were for charges that SBC Michigan agreed to waive under the Mutual Termination Agreement. In fact, in the one identified case where SBC Michigan apparently refused to credit a customer's account, the services for which the customer contracted with SBC Michigan were clearly not even covered by the Mutual Waiver Agreement.¹⁵ In other cases where SBC Michigan has allegedly billed a customer following a switch to TDS, the reason presented is typically “revenue commitment.” While it is not clear what TDS means by this cryptic notation, the Mutual Waiver Agreement clearly

¹⁵ As discussed above, the agreement covers term contracts for basic local exchange service, toll service and associated features. The customer identified on line 141 of the proposed exhibit apparently subscribed to ISDN Prime service, an unregulated service, which is clearly not within the scope of the Mutual Waiver Agreement.

provides that early termination fees “do not include charges incurred for services provide prior to termination, including, but not limited to, under-utilization charges pro-rated to the date of termination.” Accordingly, to the extent that the “revenue commitment” is intended to refer to under utilization charges or other charges for services rendered prior to the termination, the Mutual Waiver Agreement is not applicable.

D. SBC has Not Violated MTA Sections 502(1)(h), 502(1)(a), 502(1)(c) or 502(1)(f).

Apparently recognizing that the Commission lacks jurisdiction to adjudicate what amounts to a breach of contract claim between TDS and SBC Michigan regarding largely unregulated services, TDS has attempted to shoehorn its contract claims into claims of MTA violations. The effort is to no avail.

In Count I of its Complaint, TDS alleges that SBC Michigan’s billing termination fees to customers violates MTA Section 502(1)(h). This allegation is frivolous.

Section 502(1)(h) prohibits a provider from causing “a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.” The thrust of TDS’s claim is that by allegedly failing to “advise TDS Metrocom and its customers” regarding the meaning of the parties’ agreement – an agreement that TDS claims is unambiguous – SBC Michigan has somehow misled it or its customers. First, as discussed above, SBC has no such obligation to give such case by case advice to TDS, let alone TDS’s customers. The phantom duty which TDS seeks to impose on SBC Michigan would put it in an untenable position. If SBC Michigan specifically advised TDS that certain termination fees were not required to be waived under the Mutual Termination Agreement, TDS would undoubtedly claim

that SBC Michigan was wrong, and thereby caused "a misunderstanding." Section 502(1)(h) does not impose such a Hobson's choice.

In Count II of its Complaint, TDS alleges that SBC Michigan has violated Section 502(1)(a) which prohibits a provider from making "a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive." Again, TDS does not identify *any* statement made by SBC Michigan. Rather, it objects to SBC's refusal to give it advance case-by-case advice. TDS has not and cannot point to any provision of the parties' agreement that imposes such a burdensome obligation.

Count III claims that SBC Michigan has violated MTA Section 502(1)(c) by billing end-users for services they have cancelled. First, proper application of contractual termination charges hardly violates Section 502(1)(c). By definition, a termination charge is applied after a service has been cancelled. As discussed above, the Commission has repeatedly upheld providers' ability to enter into contracts containing termination charges. Billing contractual termination fees upon wrongful termination of a contract clearly does not violate Section 502(1)(c). Second, TDS has no standing to complain about bills SBC Michigan has rendered to its former customers in accordance with its agreements with those customers.

Finally, in Count VII, TDS claims that SBC Michigan has "disparaged" it in violation of Section 502(1)(f) of the MTA. The thrust of its argument is that *TDS* represented (or misrepresented) to prospective customers that termination fees would be waived. When SBC Michigan determined that certain termination fees were not required to be waived under the parties' agreement, TDS appeared "dishonest and disreputable." This claim is reminiscent of the

boy who killed his parents and then sought leniency as an orphan. Section 502(1)(f) does not cover such self-inflicted wounds.

IV. TDS HAS FAILED TO ESTABLISH EITHER EXIGENT CIRCUMSTANCES OR IRREPARABLE HARM AS REQUIRED BY SECTION 203(3) OF THE MTA

An ERO may only be granted if the requesting party affirmatively proves "irreparable harm" to its ability to serve customers in the absence of emergency relief. The claims made in do not satisfy this threshold and, consequently, the request for an ERO must be denied for this additional reason.

The proposed supporting testimony establishes, at best, a claim for "economic loss". Michigan law is unequivocal that economic injuries cannot constitute "irreparable injury" as a matter of law. In Thermatool Corp. v. Borzyn, 227 MichApp 366, 377(1998), the court held:

In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty...Economic injuries are not irreparable because they can be remedied by damages at law. (Emphasis added.)

Consequently, there is neither irreparable harm nor "exigent circumstances" that would justify an ERO. TDS's ability to serve customers is not in jeopardy by virtue of any of the matters set forth in the Complaint.¹⁶

¹⁶ There is no dispute that imposing contractual termination liability under SBC Michigan's term agreements does not violate the MTA or otherwise interfere with customers' competitive choices. It is hard to imagine how enforcing the very provisions the Commission has upheld can be viewed as a threat to competition.

V. CONCLUSION

TDS's ERO request does not request preservation of the status quo pending final resolution of its complaint. Instead, it seeks to preempt the complaint process by obtaining complete relief pending final resolution of this proceeding.¹⁷

TDS has failed to carry its burden of proof. The request for an ERO should be denied.

Respectfully submitted,

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and

DICKINSON WRIGHT PLLC



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Dated: May 20, 2003

LANSING 34060-197 319280

¹⁷ In the absence of a bond sufficient to protect SBC Michigan, it is SBC Michigan – not TDS – that would suffer irreparable harm if TDS was granted, in effect, a regulatory blessing to interfere with SBC Michigan's valid contractual relationships by inducing customers to breach those agreements.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of TDS METROCOM, LLC's)
formal complaint, application, and)
request for emergency relief against)
SBC Ameritech Michigan)
_____)

Case No. U-13789

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

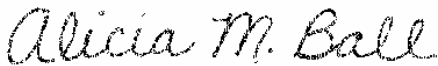
Mindy D. Smith, being first duly sworn, deposes and says she is employed at Dickinson Wright PLLC; and that on May 20, 2003, she served a copy of ***SBC Michigan's Response In Opposition To The Request For Emergency Relief*** upon the party listed below by first class mail by depositing the same in a United States postal depository, enclosed in an envelope, bearing postage fully prepaid in Lansing, Michigan:

Michael S. Ashton
Fraser Trebilcock Davis & Dunlap PC
1000 Michigan National Tower
Lansing, MI 48933



Mindy D. Smith

Subscribed and sworn to before me,
a Notary Public in and for said County,
this 20th day of May, 2003.



Alicia M. Ball, Notary Public
Ingham County, Michigan
My Commission Expires: 01/07/06

Attachment B

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint and request for)	
emergency relief filed by TDS METROCOM, LLC,)	Case No. U-13789
against SBC AMERITECH MICHIGAN.)	
_____)	

At the June 16, 2003 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

ORDER DENYING EMERGENCY RELIEF

On May 13, 2003, TDS Metrocom, LLC, (TDS) filed a complaint and request for emergency relief against SBC Ameritech Michigan (SBC), pursuant to MCL 484.2203(2). On May 20, 2003, SBC filed an answer.

On June 2, 2003, the Commission issued an order setting a hearing on the issue of whether emergency relief is necessary before a final order is issued in this case. The order stated that the burden of establishing the need for emergency relief would be on TDS.

On June 9, 2003, a hearing was held before Administrative Law Judge Barbara A. Stump (ALJ). At that time, the ALJ denied a petition to intervene filed by Telnet Worldwide, Inc., (Telnet) for purposes of the emergency hearing. The ruling was specifically without prejudice to Telnet's ability to request intervention in the complaint case. The parties presented a total of five

witnesses and 23 exhibits were entered into evidence. The hearing record consists of 233 pages of transcript.

On June 11, 2003, Telnet filed a “motion for emergency review and appeal of denial of intervention.”

MCL 484.2203(203)(3) provides:

An order for emergency relief may be granted under subsection (2) if the commission finds all of the following:

- (a) That the party has demonstrated exigent circumstances that warrant emergency relief.
- (b) That the party seeking relief will likely succeed on the merits.
- (c) That the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted.
- (d) That the order is not adverse to the public interest.

After a review of the record, the Commission concludes that TDS did not meet its burden to demonstrate that emergency relief is warranted. Specifically, the Commission is not persuaded that exigent circumstances warrant that relief or that TDS will suffer irreparable harm in its ability to serve customers if emergency relief is not granted. The Commission makes no determination with respect to the other two factors.

However, the Commission takes allegations of discriminatory and anti-competitive conduct seriously. If there is to be a healthy competitive market, the incumbent local exchange carrier cannot be permitted to engage in conduct that violates the Act. Whether SBC has in fact violated the Act is a question left for determination following a hearing on the merits of the complaint. Any proven violations will receive appropriate sanctions.

As to Telnet’s motion, the Commission finds that even if its rules could be construed to countenance such a motion, the ALJ properly denied Telnet’s request to intervene at the hearing. That hearing was to address only whether emergency relief for TDS was warranted. If the issues

were so compelling for Telnet, or any other competitive provider, Telnet was free to file its own complaint and request for emergency relief. Having not done so, it is hardly in a position to seek intervention here. Moreover, the Commission finds that the relief that Telnet seeks (reversing the ALJ's determination) would merely delay this case, rather than facilitate expediting it.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. The request for emergency relief should be denied.
- c. The ALJ's ruling denying Telnet's petition for intervention at the June 9, 2003 hearing should be affirmed.

THEREFORE, IT IS ORDERED that:

- A. The request of TDS Metrocom, LLC, for emergency relief is denied.
- B. The Administrative Law Judge's ruling denying the petition to intervene at the June 9, 2003 hearing, filed by Telnet Worldwide, Inc., is affirmed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of June 16, 2003.

/s/ Robert W. Kehres
Its Acting Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of June 16, 2003.

Its Acting Executive Secretary

In the matter of the complaint and request for)
emergency relief filed by **TDS METROCOM, LLC,**)
against **SBC AMERITECH MICHIGAN.**)
_____)

Case No. U-13789

Suggested Minute:

“Adopt and issue order dated June 16, 2003 denying the request for emergency relief by TDS Metrocom, and affirming the denial of the petition to intervene at the June 9, 2003 hearing filed by Telnet Worldwide, Inc., as set forth in the order.”